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No. 86-____

UNITED STATES SUPREME COURT
October Term, 1986

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D.,
Cross-Appellants,

v.

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security; and ROBERT K. CORBIN, Attorney General of the State of Arizona,
Cross-Appellees.

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On appeal from the United States Court of Appeals for the Ninth Circuit

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JURISDICTIONAL STATEMENT AND APPENDIX
(CONDITIONAL CROSS-APPEAL)

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EDITOR'S NOTE

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## QUESTIONS PRESENTED

IF THIS COURT DECIDES TO NOTE JURISDICTION OF THE APPEAL FILED BY THE STATE OF ARIZONA, THE QUESTION PRESENTED IN THE STATE'S JURISDICTIONAL STATEMENT IS INSUFFICIENT TO ADEQUATELY PRESENT THE SUBSTANTIAL CONSTITUTIONAL ISSUES RAISED BY THE LEGISLATION AT ISSUE, WHICH MUST NECESSARILY INCLUDE THE FOLLOWING ADDITIONAL QUESTIONS:

1. WAS THE COURT OF APPEALS IN ERROR IN HOLDING IT CONSTITUTIONAL FOR THE STATE TO REQUIRE LIMITATIONS ON SPEECH ABOUT ABORTION IN STATE-FUNDED FAMILY PLANNING AND PREGNANCY COUNSELING SERVICES?

2. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT ABROGATED THE DISTRICT COURT'S DETERMINATION THAT THE TERM "COUNSELLING FOR ABORTION

PROCEDURES" WAS UNCONSTITUTIONALLY VAGUE, AND THUS HAD A CHILLING EFFECT ON PLANNED PARENTHOOD'S FREE SPEECH RIGHTS?

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 789 F.2d 1348 (9th Cir. 1986), and is reproduced as Appendix A. The latest decision of the United States District Court for the District of Arizona is unreported. It is reproduced as Appendix B. The earlier decision of the Court of Appeals for the Ninth Circuit is reported at 718 F.2d 938 (9th Cir. 1983), and is reproduced as Appendix C. The earlier decision of the United States District Court for the District of Arizona is reported at 537 F.Supp. 90 (1982), and is reproduced as Appendix D.

## JURISDICTION

This cross-appeal is brought for the purpose of preserving cross-appellants' right to present argument to the Supreme Court on the questions identified herein, should the Court note probable jurisdiction of the State of Arizona's appeal. Review is sought of those portions of the United States Court of Appeals for the Ninth Circuit's October 18, 1983 decision (cross-appellants' Petition for Rehearing denied December 12, 1983): (i) failing to find unconstitutional that portion of Arizona state legislation which sought to deny funding to family planning programs solely on the basis of the speech content of those programs; and (ii) failing to find the legislation unconstitutional on vagueness grounds.

This cross-appeal is being docketed pursuant to Rule 12.4, Rules of the Supreme Court of the United States. Cross-appellants received appellants' jurisdictional statement on August 6, 1986.

Jurisdiction was conferred on the district court pursuant to 28 U.S.C. §§ 1331 and 1343(3). Jurisdiction was conferred on the court of appeals pursuant to 28 U.S.C. § 1391. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(2).1/

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1/ Our approach -- that is, conditionally cross-appealing in order to preserve our right to raise issues with respect to portions of the Ninth Circuit's ruling with which we disagree (despite the fact that we prevailed in the Ninth Circuit), in the event the Court notes probable jurisdiction of the State's appeal -- is suggested by the Supreme Court's opinion in Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19 (n. 43), 60 L.Ed.2d 1, 99 S. Ct. 1551 (1979). We believe that 28 U.S.C. § 1254(2) is broad enough to encompass this conditional cross-appeal. See, Regan v. Taxation with Representation, 461 U.S. 540, 543, n. 3.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment § 1 to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Footnote to the Arizona Appropriations Act, 1980:

No state money may be spent by the department of economic security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of a pregnant woman.

No state money, other than money for comprehensive medical

and dental care and the developmentally disabled, may be given by the department of economic security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental agencies or entities are exempt from the restrictions in this paragraph.

## STATEMENT OF THE CASE2/

### The Act

In its fiscal year July 1, 1980 - June 30, 1981 appropriation, the Arizona Legislature, by footnote, placed a prohibition on state monies appropriated to the Arizona Department of Economic Security. AZ. Laws 1980, ch. 244, subd. 25. The footnote (set forth verbatim, supra, at pages 5-6), prohibited any state monies from: (1) being used to subsidize abortion, abortion counseling, or abortion referral; and (2) being provided to any organization which performed abortion, or provided abortion counseling or referral services (irrespective of whether any

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2/ The parties to this cross-appeal are those listed in the caption. Cross-appellants are collectively referred to herein as "Planned Parenthood".

state monies were used for any such services).3/

The only private entity affected by this statute is cross-appellant Planned Parenthood; and the evidence shows, in fact, that the purpose of the appropriations rider was to preclude Planned Parenthood from receiving any state grants, contracts or benefits until it restricted (to an extent not cleary defined) its abortion-related activities including certain nonpejorative speech

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3/ These sections were not treated as severable by either the district court or the court of appeals, nor did the State ever contend that they were severable. The statute was ultimately invalidated in its entirety because of the unconstitutionality of the second provision. Planned Parenthood II v. Arizona, 789 F.2d 1348 (9th Cir. 1986).

about abortion.4/

Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona (hereinafter Planned Parenthood) are Arizona nonprofit corporations that offer family planning services and comprehensive counseling on all pregnancy options including abortion and, when appropriate, abortion referrals. Planned Parenthood of Central and Northern Arizona also offers first trimester abortions.

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4/ The record below shows that, in its 1979 appropriation, the Arizona Legislature enacted a funding restriction which stated: ". . . [N]o state general fund monies may be appropriated to Planned Parenthood or any of its affiliates." The Arizona Attorney General issued an opinion that this restriction was unconstitutional, prompting the Legislature to attempt to accomplish the same end indirectly, through passage of the legislation here at issue. See, Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (legislation of preceding year mandating periods of silence for meditation in all public schools motivated by same religious purpose as subsequently enacted statute permitting periods of silence for meditation or voluntary prayer.)

This case arose when Planned Parenthood sought state funds in 1980 for a 10% matching grant for family planning services under Title XX of the federal Social Security Act 42 U.S.C. § 1397 et seq. During the period relevant to this suit the federal government reimbursed the State for 90% of expenditures made for qualified family planning services requiring the providing agency to secure a 10% matching grant from state or private sources. 45 C.F.R. §§ 228.53-54 (1978) (recodified 1980, repealed 1981). Subsequent to 1980, the Arizona Legislature has not reenacted this appropriations rider. No state money is currently available for family planning or pregnancy counseling services. Pursuant to the preliminary injunction issued in the district court on October 6, 1980, Planned Parenthood received forty-seven hundred dollars

($4,700.00) from the State which, presumably, it would be required to return if this Court were to reverse the Ninth Circuit.

In order to comply with the Arizona law, the Arizona Department of Economic Security withheld state funds from Planned Parenthood because of Planned Parenthood's known association with abortion and open discussion about the abortion option in its other programs. (Planned Parenthood continued to receive federal Title XX money, however, by using private funds for the 10% matching requirement.) Planned Parenthood brought suit to enjoin enforcement of this restriction.

Proceedings Below

Cross-appellants Planned Parenthood of Central and Northern Arizona and

Planned Parenthood of Southern Arizona, as providers of some or all of the above enumerated services, and as prior recipients of state monies under the federal Title XX program, and Dr. Jack Bashaw, Medical Director of Planned Parenthood of Central and Northern Arizona, commenced this action on August 18, 1980, seeking preliminary and permanent injunctive relief against enforcement of both paragraphs of the footnote.

On September 29, 1980, the United States District Court for the District of Arizona, after an evidentiary hearing, granted Planned Parenthood's application for preliminary injunctive relief, and a written order to that effect was signed on October 6, 1980. The Ninth Circuit Court of Appeals denied the State's attempt to seek emergency appellate relief staying enforcement of the preliminary injunction.

Upon application by the State to the United States Supreme Court, this Court (Rehnquist, J.), on December 18, 1980, granted a stay of the district court's order, pending submission of briefs. On January 12, 1981, after submission of briefs, the Supreme Court vacated the stay.

Thereafter, Planned Parenthood filed a Motion for Summary Judgment, seeking an order making permanent the preliminary injunction previously entered. The State filed a Cross-Motion for Summary Judgment, contending that permanent injunctive relief should not be granted. The district court granted Planned Parenthood's Motion for Summary Judgment, and denied the State's Cross-Motion, 537 F.Supp. 90 (D. Az. 1982). The opinion of the district court is set forth at Appendix D hereto.

In granting preliminary injunctive relief, and then permanent injunctive relief, the district court determined that the footnote was unconstitutional -- with respect to both of its paragraphs -- in two respects. First, the district court determined that the use of the term "counselling for abortion procedures" was unconstitutionally vague. Second, the district court determined that the footnote impermissibly interfered with Planned Parenthood's First Amendment free speech rights.

The State appealed these determinations to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed and remanded, Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983) ("Planned Parenthood I") (Appendix C hereto). The Ninth Circuit determined that the restriction was not

unconstitutionally vague. In addition the Ninth Circuit stated that, with respect to the second paragraph of the footnote, the matter would be remanded to the district court for a determination of whether denying all state monies to Planned Parenthood was the only way the State could assure itself that Planned Parenthood would not use state monies for abortion, abortion counseling, and abortion referral services. The Ninth Circuit further held that, with respect to the first paragraph of the footnote, it was permissible for the State to refuse to fund family planning services which provide abortion information and referral services.5/

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5/ Although the Ninth Circuit in its opinion appears to have found the first paragraph of the footnote constitutional, Planned Parenthood's Complaint in this action contained

(Footnote continued on next page

On remand, and after additional discovery, the district court granted Planned Parenthood's Motion for Summary Judgment, finding that the State had failed to satisfy its burden of establishing that cutting off all funds to Planned Parenthood was the only way to assure that no state monies would be used for abortion or speech related abortion activities (see Appendix B hereto). The district court thus granted permanent injunctive relief

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(Footnote continued from previous page)

claims assailing the constitutionality of both paragraphs of the footnote on a number of additional grounds, including: violation of the Supremacy Clause; violation of the Equal Protection Clause; and a claim that the legislation constitutes a bill of attainder. None of these other claims was ever reached by the district court, and they thus remain unadjudicated.

against enforcement of the entire footnote.6/

The State once again appealed to the Ninth Circuit. The Ninth Circuit affirmed the grant of permanent injunctive relief, Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir. 1986) ("Planned Parenthood II") (Appendix A hereto).

On July 3, 1986, the State filed a Notice of Appeal. On August 6, 1986, Planned Parenthood received the State's "Jurisdictional Statement and Appendix". By Motion to Affirm, Planned Parenthood seeks a summary affirmance of Planned Parenthood II. However, should the

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6/ As the State never contended that the two paragraphs of the footnote were severable, the entry of permanent injunctive relief against enforcement of both paragraphs of the footnote, upon determination that either paragraph was unconstitutional, was clearly appropriate.

Supreme Court note probable jurisdiction and set this matter for argument, Planned Parenthood has filed this cross-appeal, in order to preserve its right to contest the determinations made by the Ninth Circuit in Planned Parenthood I: (i) that a state may grant or deny a subsidy to family planning services solely on the basis of the speech content of those services; and (ii) that the footnote was not void for vagueness.7/

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7/ See note 1/, supra.

## REASONS WHY THIS CROSS APPEAL SHOULD BE HEARD

### I. IF JURISDICTION IS NOTED ON THE STATE'S APPEAL, THE PRIVACY AND FIRST AMENDMENT QUESTIONS PRESENTED BY THIS CROSS APPEAL ARE INTEGRAL TO A REVIEW OF THE CONSTITUTIONALITY OF THE STATUTE AS A WHOLE

The State, in its Jurisdictional Statement to this Court, presents only one question: whether it is constitutional to condition eligibility for all state funds for any program on the applicant forgoing abortion-related activity (State's Jurisdictional Statement, p. i). This single question assumes the legitimacy of the state interest in promoting "human life" by manipulating information about abortion given to pregnant women (State's Opening Brief, U.S. Court of Appeals for the Ninth Circuit, September 14, 1982, at pp. 20-23), and focuses on whether the means

used by Arizona are excessive. The constitutionality of this underlying state interest was upheld by the circuit court, in its refusal to strike down the first paragraph of the statute, which precludes state family planning money from being used for abortion counseling or referral. The second paragraph of the statute, the State argues, is necessary to further implement its interest in promoting life, which interest was upheld. The circuit court accepted this view of the interrelatedness of the two portions of the statute. Planned Parenthood I, supra, 718 F.2d at 944; Planned Parenthood II, 789 F.2d at 1350-51. Because the entire premise of the circuit court's discussion of the constitutionality of the second paragraph assumes the constitutionality of the state interest, any plenary review of this case should review the constitutionality

of the entire statute - since the decision upholding the state interest in the context of the speech restrictions of the first paragraph is contrary to Supreme Court precedent.

## II. IT IS UNCONSTITUTIONAL FOR THE STATE TO REQUIRE LIMITATIONS ON SPEECH ABOUT ABORTION IN STATE-FUNDED FAMILY PLANNING AND PREGNANCY COUNSELING SERVICES.

The funding restrictions contained in the first paragraph of the statute directly interfere with a woman's fundamental right to make decisions in matters of childbearing without state interference, and violate the First Amendment rights of Planned Parenthood and its clients.8/ While monies were appropriated

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8/ Planned Parenthood and Dr. Bashaw raise not only their own claims but those of their women patients, including those pregnant patients who

(Footnote continued on next page)

by the State of Arizona in 1980 to fund family planning and pregnancy counseling services, the State (to achieve its purpose of "preserving human life") seeks to deny women full and accurate counseling. By precluding recipients of these State funds from making abortion referrals, from "counseling for abortion procedures,"9/ or even from answering direct questions that

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(Footnote continued from previous page)

are undecided about what to do and need open, truthful, complete counseling about all of their options - including abortion. Singleton v. Wulff, 428 U.S. 106, 113-116 (1976).

9/ Although the Arizona Attorney General interprets the phrase "counseling for abortion procedures", to mean something narrower than "abortion counseling", this interpretation is not binding on the state officials called upon to interpret this statute. Gooding v. Wilson, 405 U.S. 518 (1972). Moreover, no medical evidence was presented below to rebut Planned Parenthood's assertion that the two phrases are used interchangeably.

might fall within the statutory restrictions, this "counseling" is designed to promote one outcome, and to preclude meaningful choice.

A. Privacy Rights.

Planned Parenthood does not claim that the government is obligated to provide funds for family planning and pregnancy services. Once deciding to fund such medical services, however, the State is subject to constitutional limitations. Maher v. Roe, 432 U.S. 464 (1977). The State cannot directly interfere with a woman's decision by covertly skewing the provision of information. In City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), the Supreme Court held that state action affecting the information received by a pregnant woman which is "designed to influence [her] informed choice betwen abortion and child-

birth" violates her constitutional right of privacy because it places "obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision." 462 U.S. at 445, quoting Whalen v. Roe, 429 U.S. 589, 604 n. 33 (1977). See also, Thornburgh v. American College of Obstetricians and Gynecologists, ____ U.S. ____, (No. 84-495; 1986) (finding invalid a Pennsylvania statute requiring a physician to distribute certain printed materials to his patients, on the grounds that it constituted "nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician").

Unlike the funding regulation at issue in Harris v. McRae, 448 U.S. 297 (1980), this statute does not leave women

"with at least the same range of choice in deciding whether to obtain . . . an abortion as she would have had if . . . [the Legislature] had chosen to subsidize no . . . [family planning services] at all." (emphasis added) 448 U.S. at 317.

Since the State has chosen to selectively provide information without informing patients that they are not receiving all information, this statutory scheme is affirmatively harmful and deceptive. In both Harris v. McRae, supra, and Maher v. Roe, supra, the State provided payment for poor women for childbirth but not for abortion. However, no effort was made to prevent women from making an informed choice. This Court thus held that the regulations in Harris and Maher were not constitutionally repugnant because, in those cases, the state "has imposed no restriction on access to abortion that was

not already there," Maher v. Roe, supra, at 474. See also, Harris v. McRae, supra, at 316 ("government may not place obstacles in the path of a woman's freedom of choice").

Under the legislation challenged here, in contrast, "restrictions on access" and "obstacles" are affirmatively being interposed by the State. Family planning and pregnancy counseling programs which previously could have provided women with information about abortion can only continue to provide that information by foregoing the subsidy. Thus, the State, through the legislation, has sought to use its fiscal muscle to restrict - if not eliminate - avenues available to women to obtain information about abortion.

The legislation thus has as its aim that patients not receive full, truthful information. Rather, by the State's

own admission, its intent was to affect the decisional process of the patient by manipulating information available to her - the program advances Arizona's "interest" only to the extent that it affects a woman's decisional processes. This legislation thus constitutes direct state interference with the abortion decision, and is therefore subject to strict judicial scrutiny. Roe v. Wade, 413 U.S. 113, 155 (1973).

Under a strict scrutiny test, the legislation fails, as - at least until the end of the first trimester of pregnancy - the State's avowed goal of "promoting fetal life" is not compelling. Roe v. Wade, supra, at 163. See also, City of Akron v. Akron Center for Reproductive Health, supra; and Thornburgh v. American College of Obstetrician and Gynecologists, supra. In both Akron and Thornburgh, this Court explicitly recognized that, in the

context of a physician's provision of informed consent to his patient, the manipulation or distortion of information regarding abortion unconstitutionally invaded the parties' privacy rights. The Ninth Circuit's decision in Planned Parenthood I - which appears to have relied upon Harris v. McRae, supra, in extending the Harris holding to reach abortion speech - simply flies in the face of the proscriptions announced by this Court in Thornburgh and Akron.10/

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10/ A lower court decision directly on point found that exclusion of abortion information in a state-funded program constitutes an unconstitutional interference with the privacy right. Planned Parenthood v. Kempiners, 568 F.Supp. 1490 (N.D.Ill., E.D. 1983):

> "The ability of women in the program to make their childbirth decision free from state interference is dramatically affected by such counseling much more so than if the State provided no counseling program at all. This program

(Footnote continued on next page)

B. Free Speech Rights.

The restrictions in the first paragraph of the footnote limiting and chilling abortion-related speech in state-funded counseling programs violates the First Amendment rights of doctors and counselors as well as the right of patients. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 464-57 (1975); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Griswold v. Connecticut, 38 U.S. 479, 482 (1965). This right includes the right to receive information about abortion. Bigelow v. Virginia, 421 U.S. 809, 821-22 (1975).

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(Footnote continued from previous page)

> violates due proces for the same reasons that any attempt by the state to pursue its interest in potential life by giving women misleading or incomplete information designated to affect their abortion decision does." 568 F.Supp. at 1499.

It is true that the government is not compelled by the First Amendment to subsidize the exercise of free speech rights. For instance, on at least two occasions the Supreme Court has upheld regulations denying certain tax benefits to organizations engaged in lobbying. See Regan v. Taxation with Representation, 461 U.S. 540, (1983); Cammarano v. United States, 358 U.S. 498 (1959). These regulations, however, were content-neutral, and in both cases the Court stressed that it would be a quite different situation if the government's denial of subsidies were "aimed at the suppression of dangerous ideas." Regan v. Taxation with Representation, 461 U.S. 540, 548, quoting Cammarano v. U.S., 358 U.S. 498, 513, quoting Speiser v. Randall, 357 U.S. 513, 519 (1958). The Arizona funding restriction presents precisely this kind of

content-based distinction.

A content-based distinction, where the permissibility of the speech is "dependent solely on the nature of the message being conveyed", Carey v. Brown, 447 U.S. 455, 461 (1980), strikes at the core of First Amendment values, and must be strictly scrutinized. Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 540 (1980), (the government must show that "the regulation is a precisely drawn means of serving a compelling state interest"); Carey v. Brown, supra at 461-62 (legislation must be "finely tailored to serve substantial state interests, and the justifications offered for any distinctions must be carefully scrutinized") see also Police Department of the City of Chicago, et al. v. Mosley, 408 U.S. 92 (1972); U.S. v. O'Brien, 391 U.S. 367, 377 (1968); Jaffe v. Alexis, 659 F.2d 1018, 1020-21 (9th Cir. 1981).

This careful scrutiny when speech is involved is required even where the speech is subsidized by the government. Thus, in FCC v. League of Women Voters, 468 U.S. 364 (1984), this Court invalidated a federal statute which sought to impose a prohibition on editorial comment by public broadcasting stations which received federal grants. Quoting from this Court's determination in Consolidated Edison Co. v. Public Service Commission, supra, the Court found that the regulation violated the First Amendment's free speech guarantees, as "[a] regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest form of a 'law . . . abridging the freedom of speech' . . .", 468 U.S. ___ 82 L.Ed.2d at 294.

Significantly, while the dissent-

ers would have upheld the restriction, the dissenting opinion of Mr. Justice Rehnquist makes clear that such a prohibition could only pass constitutional muster if it were content-neutral:

> ". . . Congress' prohibition is strictly neutral. In no sense can it be said that Congress has prohibited only editorial views of one particular ideological bent . . . . I find this case entirely different from the so-called 'unconstitutional condition' cases, wherein the Court has stated that the government 'may not deny a benefit to a person that infringes his constitutionally protected interests -- especially his interest in freedom of speech.' Perry v. Sinderman, 408 U.S. 593, 497, 33 L.Ed.2d 570, 92 S. Ct. 2697." FCC v. League of Women Voters, supra, 82 L.Ed.2d at 309 (Rehnquist, J., dissenting).

And, in his separate dissent, 82 L.Ed.2d at 312, Mr. Justice Stevens stated:

> ". . . [O]f greatest significance for me, the statutory restriction is completely neutral in its operation -- it prohibits all editorials without any distinction being drawn concerning the subject matter or the point of view that might be expressed."

Similarly, in Cornelius v. NAACP Legal Defense and Information Fund, 473 U.S. _____, 87 L.Ed.2d 567, 582 (1985), this Court reiterated that governmental regulation of speech activities must be content-neutral. In Cornelius, the Court held that a regulation excluding certain types of groups from inclusion on a list of charities to be given to federal employees could be upheld only where the government's decisions with respect to inclusion or exclusion were viewpoint-neutral:

> "The government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject." 87 L.Ed.2d at 582.

See also, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 519 (1981) (recognizing general rule that "government restrictions on speech cannot favor certain communicative contents over

others").

The State of Arizona engages i precisely the same content-based discrimi nation when it chooses to fund only thos family planning programs which do no provide information on abortion. As consequence of the first paragraph of th footnote, persons who avail themselves o government-subsidized family plannin services are completely denied access t information about abortion.11/ By virtu of its denial of a subsidy only to thos

---

11/ That this prohibition does not effect uate a total denial of access to in formation about abortion (since suc information would, presumably, stil be available through, e.g., non-stat subsidized family planning programs is of no consequence. The Suprem Court has "consistently rejected th suggestion that a government may jus tify a content-based prohibition b showing that speakers have alternativ means of expression," Consolidate Edison Co. v. Public Service Commis sion, supra, 447 U.S. 530, 538.

family planning services which discuss the abortion alternative, the State thus improperly interferes with a woman's constitutionally protected right to make fully informed decisions about her pregnancy free from governmental compulsion. Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

Indeed, by requiring state subsidized family planning services to provide only a particular point of view -- thereby denying to users of such state subsidized services all information about the abortion alternative -- the State is engaging in precisely the type of "unreasonable official interference with private choice" condemned in Harris v. McRae, 448 U.S. at 328-9, (White, J., concurring). See, Thornburgh v. American College of Obste-

tricians and Gynecologists, supra.12/

---

12/ See also, Valley Family Planning v State of North Dakota, 489 F.Supp 238, 242 (D. N. Dak. 1980) ("An indi rect inhibition or deterrence of th exercise of a constitutional right i as odious as the direct prohibition o the exercise of that right."); Ala Gutmacher Institute v. McPherson, 51 F.Supp, 195, 205 (attempt to restric dissemination of information regardin abortion "involves the most sensitiv area of First Amendment concern: gov ernmental attempts to manipulate th public flow of information about con troversial issues"); Planning Parent hood Association Chicago Area v Kempiners, 568 F.Supp. 1490, 149 (N.D.Ill., E.D. 1983):

> ". . . [G]overnment may not deny a person a governmental benefit for a constitutionally impermissible reason. [citation omitted] It is not a sufficient answer that the challenged conduct involves only a refusal to subsidize. If that were enough, the state could, for example, deny welfare to blacks, Republicans, or persons who merely spoke out against an incumbent administration's policies, and defend itself by arguing that persons were no worse off than if the state had provided no welfare at

(Footnote continued on next page)

In ruling that the content-based, speech restricting first paragraph of the Legislation here at issue was not an unconstitutional interference with Planned Parenthood's First Amendment free speech and privacy rights, the Ninth Circuit thus committed reversible error.13/

---

(Footnote continued from previous page)

> all. The appropriate test is not whether the challenged conduct involves a refusal to subsidize, but rather whether that refusal is based on a constitutionally permissible criterion."

13/ The Ninth Circuit, in seeking to justify its ruling, found -- apparently as a matter of fact -- that the first paragraph "has imposed no restrictions on access to abortions or the free flow of information concerning abortion," Planned Parenthood v. Arizona, 718 F.2d 938, 944 (1983). The record before the Ninth Circuit contained nothing to support this conclusion.

III. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT ABROGATED THE DISTRICT COURT'S DETERMINATION THAT THE TERM "COUNSELING FOR ABORTION PROCEDURES" WAS UNCONSTITUTIONALLY VAGUE, AND THUS HAD A CHILLING EFFECT ON PLANNED PARENTHOOD'S FREE SPEECH RIGHTS. A SUBSTANTIAL FEDERAL QUESTION IS THUS PRESENTED.

One of the grounds upon which Planned Parenthood sought injunctive relief in the district court was that the funding restriction was void for vagueness. Planned Parenthood contended that the terms "counseling for abortion procedures" and "abortion referrals" were so vague and indefinite that Planned Parenthood could only guess -- at its peril -- at what abortion speech activities were within the ambit of the footnote's restrictions. The district court, in granting injunctive relief, did so on the grounds, inter alia, that the term

"counseling for abortion procedures" was unconstitutionally vague:14/

> ". . . [D]ue to the footnote's ambiguity the plaintiffs will be forced to guess whether they are in violation of the law when they engage in an abortion related conversation with one of their clients. The danger of liability for incorrectly interpreting the footnote will undoubtedly have a chilling effect on the exercise of the plaintiff's constitutional right of freedom of speech. This the Constitution will not permit." Planned Parenthood v. Arizona, 537 F.Supp. 90, 92 (D.Az. 1982).

The Ninth Circuit, in Planned Parenthood I, supra, reversed this determination, on the grounds, inter alia, that the fact that Planned Parenthood was unable to ascertain or comprehend what limitations the State intended be placed on its speech activity under the footnote did not provide a basis for finding it unconstitutionally vague, as "the potential for

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14/ The district court did not reach the issue of whether the term "abortion referrals" was impermissibly vague.

such differences of opinion [between the State and Planned Parenthood, in interpreting the footnote] cannot be enough to render a statute void for vagueness," Planned Parenthood I, supra, 718 F.2d at 948. The court of appeals committed error in reversing the district court on this issue.

The due process clause of the Fourteenth Amendment prohibits deprivation of liberty or property without due process of law. It is well established that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Construction Company, 269 U.S. 385, 391 (1926).

A vague statute is especially vulnerable to constitutional attack when it impinges upon the exercise of protected constitutional rights, such as the right to a first trimester abortion free of state interference, or freedom of speech. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); NAACP v. Button, 371 U.S. 415, 433 ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

So, for example, in Colautti v. Franklin, 439 U.S. 379 (1979), the Supreme Court struck down on vagueness grounds a Pennsylvania statute which imposed civil and criminal penalties on physicians who failed to take certain medical measures when performing abortions where a fetus was "viable" or "may be viable." Finding

these standards to present "ambiguou
criteria", the Court concluded that th
statute "presents serious problems o
notice, discriminatory application, an
chilling effect on the exercise of con
stitutional rights." 439 U.S. at 608.

Significantly, in Harris v MacRae, supra, the Supreme Court, i rejecting a claim that the "life of th mother would be endangered" language o the Hyde Amendment was void for vagueness did so on the following bases:

> ". . . (1) the sanction provision in the Medicaid Act contains a clear scienter requirement under which good faith errors are not penalized . . ." and, (2) in any event, the exceptions to the Hyde Amendment 'are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.' [Citation omitted.]" 448 U.S. at 311, n. 17.

We observe that the Arizona foot note has no scienter provision. We fur

ther observe that it is simply untenable to argue that a provision that deprives one of access to information about abortion does not severely damage the public interest. Further, the Harris Court did not have before it a statute that sought to chill free speech by penalizing an agency or individual for discussing abortion.

Thus, in all of these cases, the Supreme Court recognized that First Amendment free speech rights are impermissibly infringed by a statutory proscription which fails to give fair notice of what speech activity is forbidden. See, Lanzetta v. New Jersey, supra, 306 U.S. at 453 (persons "are entitled to be informed as to what the State commands or forbids"). In the present case, despite the fact that the Arizona officials charged with monitoring the Title XX program

admitted that they were unable to discern from the vague language of the footnote just what abortion speech it sought to prohibit,15/ the court of appeals erroneously concluded that the restriction did provide Planned Parenthood with sufficiently defined notice of what types of abortion speech would result in a violation.

The court of appeals' attempt to justify the vague restriction by saying, in essence, that if Planned Parenthood guesses incorrectly as to what the statute is intended to cover, it can defend its interpretation in court, 718 F.2d at 948, is a position which simply ignores the

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15/ At deposition, Ms. Bette DeGraw, the Arizona official responsible for Title XX compliance, testified that "I don't know what the definition [of "counseling for abortion procedures"] would be." Deposition of Bette DeGraw, September 25, 1980, pp. 24-25.

substantial precedent cited herein. Accordingly, this Court should reverse the court of appeals' decision on vagueness, and reinstate the determination of the district court.

## CONCLUSION

Based upon the foregoing, it
respectfully requested that, should t
Supreme Court note probable jurisdicti
of the appeal filed by the State, it no
probable jurisdiction of this cross-appe
as well.

Respectfully submitted this 4
day of September, 1986.

SACKS, TIERNEY & KASEN, P.A

By: Lawrence J. Rosenfeld
Seymour Sacks
Leslie A. McCarthy

Janet Benshoof,
Of Counsel

No. 86-_____

UNITED STATES SUPREME COURT

October Term, 1986

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PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D., Cross-Appellants,

v.

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security; and ROBERT K. CORBIN, Attorney General of the State of Arizona, Cross-Appellees.

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On appeal from the United States Court of Appeals for the Ninth Circuit

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# APPENDIX TO JURISDICTIONAL STATEMENT

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# APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED MAY 15, 1986

PLANNED PARENTHOOD OF CENTRAL AND NORTHER
ARIZONA, an Arizona non-profit corp.
Planned Parenthood of Southern Arizona
an Arizona non-profit corp.; Jac
Bashaw, M.D., on behalf of himself, hi
patients, and all others similarl
situated, Plaintiffs-Appellees,

v.

The STATE OF ARIZONA; Bruce E. Babbitt
individually and as Governor of th
state of Arizona; William Jamieson
individually and as Director of th
Department of Economic Security; Rober
K. Corbin, individually and as Attorne
General of the State of Arizona, thei
employees, agents, representatives
successors, and those acting in concer
with them and all others similarl
situated, Defendants-Appellants.

No. 85-1612.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Feb. 12, 1986.

Decided May 15, 1986.

Appeal from the United States District Court for the District of Arizona

Before: SNEED and HALL, Circuit Judges, and KELLEHER,* District Judge.

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* Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

SNEED, Circuit Judge:

This is an appeal from a district court's grant of a summary judgment holding unconstitutional, as sought to be applied against Planned Parenthood and its patients, a portion of an Arizona appropriation bill and awarding attorneys' fees to the plaintiffs. We affirm the district

court's judgment on the merits, modify t
attorneys' fee award, and award attorney
fees on appeal.

I.

FACTS

Arizona participates in a Title
federal grant program that provides fede
al reimbursement for 90% of the expend
tures Arizona makes for certain fami
planning services. Arizona allocates 1
matching funds to pay for these service
See Planned Parenthood v. Arizona, 7
F.2d 938, 941 (9th Cir. 1983) (Planne
Parenthood I). This controversy has i
origins in a restriction on use of t
state funds for abortion-related act
vities. The restriction was contained
a two-paragraph footnote to the Arizo
bill appropriating the state's ten perce

matching funds. It consists of two paragraphs and reads as follows:

> No state money may be spent by the department of economic security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of the pregnant woman.
>
> No state money, other than money for comprehensive medical and dental care and the developmentally disabled, may be given by the department of economic security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental agencies or entities are exempt from the restrictions in this paragraph.

1980 Ariz. Sess. Laws 842, 860 n*.

Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona (collectively referred to as Planned Parenthood) brought suit to enjoin enforcement of this footnote. They argued that the footnote is an unconstitutional restriction on their freedom of

speech and is void for vagueness. In 1982, the district court held that the footnote is unconstitutional on both first amendment grounds and vagueness grounds. In 1983, this circuit held that the statute is not unconstitutionally vague. Planned Parenthood I, 718 F.2d at 949. Its resolution of the first amendment issue was more complex.

The first paragraph of the Arizona statute prohibits the use of state funds for abortion-related services. Relying on Maher v. Roe, 432 U.S. 464 (1977), Planned Parenthood I upheld this portion of the statute. See 718 F.2d at 942-44. The second paragraph of the statute prohibits use of state funds by organizations that offer abortion-related services, even if the state funds themselves are not used for abortion-related services. Planned Parenthood in our first encounter characterized this portion of the statute as a

penalty designed to chill the exercise of the constitutional right to provide abortions. The State argued to the Planned Parenthood I panel that this second paragraph of the statute was constitutional because, since it was impossible for the state to monitor use of the funds to prevent their use for abortion-related services, it was a measure necessary to the enforcement of the constitutionally proper first paragraph. The Planned Parenthood I panel remanded "to give the State the opportunity to prove that withdrawing all state funds from Planned Parenthood was the only way to ensure that Planned Parenthood would not use state funds to support its abortion-related activities." Id. at 946.

On remand, the district court received depositions on this issue and granted summary judgment for Planned Parenthood. The State appeals. It argues, first, that

the district court erred in grant
summary judgment for Planned Parenthoo
second, that the district court inclu
improper costs in the fee award; a
third, that the district court erred
awarding Planned Parenthood an upwa
adjustment of the attorneys' fee awa
above the "lodestar" amount. Plann
Parenthood also seeks attorneys' fees
the cost of defending against the State
appeal.

II.

MOOTNESS

The State in its first argume
appears to frame a strange and simplis
proposition. It proceeds as follow
Planned Parenthood of Northern and Centr
Arizona spent funds on "counseling f
abortion procedures or abortion referra
that had their source, in part, in St
funds. This expenditure demonstrates th

"withdrawing all state funds from Planned Parenthood . . . [is] the only way to ensure that Planned Parenthood would not use state funds to support its abortion-related activities." Id. at 946. This, in turn, removed any cloud of possible unconstitutionality from paragraph two of the Arizona footnote and rendered any dispute on this issue moot.

The flaw in the argument is that Planned Parenthood's expenditure by no means demonstrates that withdrawal of funds is necessary to prevent violation of the footnote's first paragraph. The argument of the State renders this court's remand in Planned Parenthood I an exercise in futility. Had we assumed, as the State does in its argument, that any expenditure on abortion-related activities necessarily is derived from state funds at least to the extent of ten cents on the dollar, the remand would have been pointless. The

constitutionality of the second paragra
on the basis of this assumption shou
have been confronted in Planned Parentho
I. Not having done so, we obvious
rejected the State's assumption. We pr
ceeded on the basis that it was the bu
den of the State to show that ear-marki
of state funds for non-abortion-relat
activities and a system of tracing reaso
ably susceptible to auditing by sta
officials was not possible to create.

Thus, the question before us
whether the State has made such a showi
It is not moot. See 13A C. Wright,
Miller & E. Cooper, Federal Practice a
Procedure § 3533, at 212 (1984).

III.

CONSTITUTIONALITY OF THE STATUTE

We review the district court's gra
of summary judgment de novo. See, e.g

Lojek v. Thomas, 716 F.2d 675, 677 (9th Cir. 1983).

Turning to the merits, we note that neither of the parties have attempted to persuade us to reconsider the Planned Parenthood I decision. Moreover, it is clear that on remand the showing made by the State does not establish the impossibility of monitoring funds. Affidavits by State officials charged with distributing the funds, which are not controverted, established that monitoring was feasible. See Excerpt of Record (E.R.) at 40-41 (deposition of Guy Mikkelsen); id. at 43 (deposition of Betty DeGraw).

Planned Parenthood also produced substantial evidence before the district court on the issue of feasibility of monitoring. Finally, in its brief to this court, the State has conceded that the spending practices of the Southern Arizona branch of Planned Parenthood adequately

segregate state funds f
abortion-related services. Appellan
Opening Brief at 9 n. 3.

The State contends that the spend
practices of Planned Parenthood
Northern and Central Arizona demonstr
the impossibility of monitoring. This
simply not so. The State to moni
effectively need not be present at ev
client and patient interview. The fact
that the State has not attempted to mo
tor expenditures by Planned Parentho
The most that can be said is that mis
of funds is possible so long as the St
fails to monitor spending. This is a
cry from evidence that monitoring is
possible.

In short, Planned Parenthood has s
mitted convincing evidence on the fea
bility of monitoring the funds. The St
has not controverted that evidence
even admits that Planned Parenthood

Southern Arizona has successfully segregated state funds from its abortion-related expenditures. We hold, after a de novo review, that the district court's grant of summary judgment on the constitutionality of paragraph two of the Arizona footnote as applied against Planned Parenthood and its patients was proper.

IV.

ATTORNEYS' FEES IN THE DISTRICT COURT

Because Planned Parenthood prevailed in the litigation, the district court awarded its attorneys' fees under the Civil Rights Attorney Fee Award Act of 1976, 42 U.S.C. § 1988. It calculated the award in two steps. First, it multiplied the number of hours Planned Parenthood attorneys spent on the case by the customary hourly rates of those attorneys. This produced the "lodestar amount." Second, it increased that award by a

multiplier of ten percent. The Sta
objects to this award on two front
First, it argues that the award inclu
"excessive, redundant, or otherwi
unnecessary" costs. Appellant's Openi
Brief at 12-13. Second, it challenges t
application of the multiplier in light
Blum v. Stenson, 465 U.S. 886 (1984).

At the outset we note that dete
mination of attorneys' fees "is within t
sound discretion of the trial court a
will not be disturbed absent an abuse
discretion." Rutherford v. Pitchess, 7
F.2d 1415, 1420 (9th Cir. 1983); s
Hensley v. Eckerhart, 461 U.S. 424, 4
(1983) (emphasizing "the district court
superior understanding of the litigati
and the desirability of avoiding freque
appellate review of what essentially a
factual matters"). We also acknowled
that looking over the shoulders
attorneys to examine their charges is n

a task welcomed by judges. Fee shifting makes our scrutiny necessary, however. Even though our competence to undertake this scrutiny is limited at best, we must assume the burden because at present no other bearer is available. Somebody must decide what fees should appropriately be shifted to the loser. No doubt our "incompetence" in this area is no greater than it is in many others in which we are compelled to render decisions; and it is, I suspect, our limited ability to avoid decisionmaking, in comparison to that enjoyed by the other two great branches of government, that induces many litigants to crowd our portals.

So, in full awareness of our limitations, we address the issue of attorneys' fees.

A. The "Excessive" Costs Issue

The State relies on Hensley v. Eckerhart for its argument that the dis-

trict court's award forces the State reimburse Planned Parenthood for impro expenses. Hensley discussed the adju ments district courts should make section 1988 awards when plaintiffs h been only partially successful. In course of that discussion, the Co explicated its views on calculation of lodestar amount. The Court's ideas garding excess cost are both reasona and not unusual:

> Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority."

461 U.S. at 434 (quoting Copeland Marshall, 641 F.2d 880, 891 (D.C. Ci

1980) (en blanc)) (emphasis by Copeland court).

Hours expended in pursuit of unsuccessful claims in civil rights cases were treated as follows:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of the counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation . . . .

Id. at 435.

Neither hours not properly billed to one's client nor hours expended on dis-

crete and unsuccessful claims exist
this case. The State lists four cat
gories of attorney effort to which
objects:

> time spent for the unsuccessful attempt to name the State of Arizona as a defendant; their attempt at garnishment to collect the previously awarded attorneys' fees judgment; the time spent on whether the preliminary injunction appeal was moot pursuant to this Court's request; and the time spent on the void-for-vagueness issue which this Court has decided in the defendant's favor.

Appellant's Opening Brief at 12. We thi
that a reasonable client who had receiv
the results obtained in this litigati
would not cavil at being billed for the
ancillary efforts. We also think that
is improper in this case to categorize a
of these efforts as discrete claims. T
thrust of this lawsuit was Planned Paren
hood's effort to continue receiving sta
funds. All of these activities are aim
at that result. We hold that all of t
challenged activities are properly compe

sable by an attorneys' fee award under section 1988.

B. Use of a Multiplier Issue

We approach the use of a multiplier somewhat differently, however. In Planned Parenthood I, the panel concluded that "there is nothing to suggest that the court abused its discretion in any way in determining the appropriate 'multiplier' or adjustment factor." 718 F.2d at 951. First, because the panel vacated the fee award when it remanded the case for further factfinding on the first amendment claim, we are not bound by the Planned Parenthood I panel's consideration of the attorneys' fee issue. It is clear that the court's evaluation of the use of the multiplier was dicta. See 718 F.2d at 951.[1/] Moreover, because the Supreme Court has recently decided a case on this question, Blum v. Stenson, 465 U.S. 886

(1984), we are less inclined than we mi
ordinarily be to adopt the conclusions
the prior panel without independent c
sideration. See Kimball v. Callahan,
F.2d 768, 771-75 (9th Cir.), cert. deni
444 U.S. 825 (1979); White v. Murtha,
F.2d 428, 431-32 (5th Cir. 1967); 18
Wright, A. Miller & E. Cooper, Fede
Practice and Procedure § 4478, at 790
(1981).

Planned Parenthood suggests two ju
ifications for imposition of a multipl
in this case: the plaintiff's success
the lawsuit and the contingency
recovery. Our examination of Blum
Stenson convinces us that neither of th
factors justifies the use of a multipl
in this case.

In Blum v. Stenson, the Court d
cussed the manner in which a plaint
could justify a section 1988 fee award

excess of the lodestar amount. The Court stated that "[t]he burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant." 465 U.S. at 898. The Court went on to reverse the district court's imposition of a multiplier because the plaintiff "introduced no evidence that enhancement was necessary to provide fair and reasonable compensation." Id. at 901.

Planned Parenthood attempts to justify use of the multiplier by pointing to the success of their efforts. This is inadequate justification. As the Supreme Court pointed out in Blum v. Stenson, see id. at 900, adequate compensation for the success of a civil rights plaintiff will normally be secured by an award based on the number of hours billed and the billing rate of the attorneys. Many clients with reasonable bargaining power would insist upon

paying no more. We do not think the St
of Arizona should be required to shoul
a greater burden.

The Supreme Court also addressed
factors of risk and contingency of rec
ery as bases for upward fee adjustmen
The Court seemed to approve an adjustm
based on "risks associated with the li
gation or claim that the risk of nonp
ment required an upward adjustment
prove a reasonable fee." Id. at 9
accord LaDuke v. Nelson, 762 F.2d 13
1332-33 (9th Cir. 1985) (EAJA case); H
v. Borough of Roselle, 747 F.2d 838,
(3d Cir. 1984) (section 1988 case).
Court's language apparently refers to
contingent fee arrangement common to m
areas of the law. At oral argument, h
ever, counsel for Planned Parenthood c
ceded that the fee arrangement in t
case was not contingent.

Planned Parenthood's argument is slightly different. It argues that the controversial nature of the abortion issue makes "risky" the representation of clients like Planned Parenthood. It argues that controversial representation may have an adverse effect on the law firm's other business by soiling its reputation. We recognize that the "undesirable" nature of a case is an appropriate factor in determining attorneys' fees. See, e.g., Kerr v. Screen Extras Guild, 526 F.2d 67, 69-70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974), cited with approval in S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (legislative history of § 1988), reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5913.

Nevertheless, we reject this cont
tion as a justification for the imposit
of a multiplier in this case. Contro
sial representation is just as likely
bolster the reputation of a law firm a
is to harm it. Planned Parenthood
have its enemies; but it also has m
friends. It is hardly a pariah. Mo
over, there is no evidence in the rec
that the representation actually pose
substantial risk to the law firm's bu
ness or that any risk presented was
adequately taken into consideration
setting the hourly rate. The Supr
Court's opinion in Blum predisposes
against the use of a multiplier unless
successful plaintiff has demonstrated t
a lodestar amount does not represen
fully compensatory fee. The plaintiffs
this case have made no such showing,
rely instead on abstract arguments

their brief. Accordingly, we reverse the district court's judgment to the extent that it applied a multiplier in calculating the fee award.

V.

ATTORNEYS' FEES ON APPEAL

Planned Parenthood seeks attorneys' fees on appeal under section 1988. As the Supreme Court has noted, "a prevailing [civil rights] plaintiff '"should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."'" Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (quoting Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)), reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912). Planned Parenthood clearly has prevailed on the merits of this appeal. There are

no circumstances making such an a
unjust. We hold, therefore, that Pla
Parenthood is entitled to attorneys'
for the reasonable expenses of
appeal. The judgment of the dist
court is affirmed in part, reverse
part.

AFFIRMED IN PART, REVERSED IN PART

## APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED JANUARY 7, 1985

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

| | | |
|---|---|---|
| PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona non-profit corporation, et al., | ) | No. CIV 80-66 PHX WEC |
| Plaintiffs, | ) | JUDGMENT |
| v. | ) | |
| THE STATE OF ARIZONA, et al., | ) | |
| Defendants. | ) | |

Plaintiffs Planned Parenthood Central and Northern Arizona, Plann Parenthood of Southern Arizona, and D Jack Bashaw, having moved for summa judgment on the issue identified by t Ninth Circuit in its decision remandi the case to this Court (718 F.2d 9 (1983)); and the Court having considere the parties' memoranda, the affidavit submitted by plaintiffs, the statements o facts submitted by the parties, oral argu

ment of counsel, and all other matters of record, the Court finds as follows:

1. The basis upon which the Ninth Circuit remanded this Court's previous grant of summary judgment to plaintiffs on plaintiffs' free speech claim (Fourth Claim for Relief), was to give the State an opportunity to attempt to prove that "withdrawing all state funds from Planned Parenthood was the only way to ensure that Planned Parenthood would not use state funds to support its abortion related activities," 718 F.2d at 946.

2. Subsequent to remand on this issue, plaintiffs moved for summary judgment, supported, inter alia, by affidavits, and by the deposition testimony of state officials, contending that no material fact issue precluding summary judgment existed with respect to the issue identified in quotes in the preceding paragraph.

3. Defendants have failed to present to this Court any material matter of fact with respect to the issue identified by the Ninth Circuit.

4. It is therefore:

a. ORDERED granting plaintiffs' Motion for Summary Judgment as to its Fourth Claim for Relief, and permanently enjoining defendants from enforcing the unconstitutional legislation at issue; and it is further

b. ORDERED denying defendants' Cross-Motion for Summary Judgment; and it is further

c. ORDERED upon consideration of the memoranda and oral argument of counsel, and of all pertinent factors (as identified, for example, in

Kerr v. Screen Extras Guild, 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976)) (reinstating this Court's earlier award of attorneys' fees and costs in the principal sum of $37,045.96* (plus interest at the legal rate from July 29, 1981), and awarding plaintiffs additional attorneys' fees in the principal sum of $36,335.20 (plus interest at the legal rate from the date of entry of

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* Fees: $35,860.00; Costs: $1,185.96.

this Judgment), for a total attorneys' fees award in the principal sum of $72,195.20, and costs of $1,185.96.

5. This Court determines that there is no just reason for delay in the entry of this Judgment, and Judgment is expressly directed to be entered forthwith.

6. It is further ORDERED that process as necessary to execute upon this Judgment shall issue.

DATED this 7th day of January, 1985.

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Honorable Walter E. Craig, Judge, United States District Court, District of Arizona

## APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED FEBRUARY 18, 1993

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona non-profit corporation; Planned Parenthood of Southern Arizona, an Arizona non-profit corporation; Jack Bashaw, M.D., on behalf of himself, his patients, and all others similarly situated, Plaintiffs-Appellees,

v.

The STATE OF ARIZONA; Bruce E. Babbitt, individually and as Governor of the State of Arizona; William Jamieson, individually and as Director of the Department of Economic Security; Robert K. Corbin, individually and as Attorney General of the State of Arizona, their employees, agents, representatives, successors, and those acting in concert with them and all others similarly situated, Defendants-Appellants.

No. 82-5437.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Feb. 18, 1983.

Decided Oct. 18, 1983.

Appeal from the United States District Court for the District of Arizona

Before: CHOY and ALARCON, Circuit Judges, and D. WILLIAMS,* District Judge.

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* The Honorable David W. Williams, Senior United States District Judge for the Central District of California, sitting by designation.

CHOY, Circuit Judge:

Planned Parenthood instituted this suit to challenge the constitutionality of a footnote to an Arizona appropriation bill that forbade the expenditure of state social welfare funds to support nongovernmental organizations that perform abortions and engage in abortion-related acti-

vities. The district court, on a motion for summary judgment, declared the footnote unconstitutional and permanently enjoined its enforcement. Planned Parenthood of Central & Northern Arizona v. Arizona, 537 F.Supp. 90 (D.Ariz. 1982). The State now appeals the summary judgment, the attorneys' fee awarded to Planned Parenthood, and a preliminary injunction issued during the course of the litigation.

## I. Background

Arizona is a participant in a Title XX federal grant-in-aid program that provides federal funds for family planning services offered as a part of a state's social welfare program. During the period relevant to this suit, the federal government reimbursed a state for 90% of expenditures made for qualified family planning

services, whether the state provided those services itself or contracted with private organizations to provide them. 42 U.S.C. § 1397a(a)(1) (Supp. III 1979), amended by 42 U.S.C. § 1397a (Supp. V 1981); 45 C.F.R. §§ 228.70 et seq. (1978) (recodified 1980; repealed 1981). The providing agency or organization had to secure a 10% matching fund from state or private sources in order to complete funding for the services and to remain eligible for the 90% federal assistance. 45 C.F.R. §§ 228.53-.54 (1978) (recodified 1980, repealed 1981).

The State of Arizona had been providing the 10% matching funds to private organizations that provided family planning services under contract with the State. However, effective throughout the fiscal year from July 1, 1980, to June 30, 1981, the State of Arizona enacted a foot-

note to its General Appropriations Bill that forbade the Department of Economic Security from giving state money to any nongovernmental "agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals." 1991 Ariz.Sess.Laws 842, 860 n. *.[1/]

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1. The footnote at issue read, in relevant part:

> No state money may be spent by the department of economic security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of a pregnant woman.
>
> No state money, other than money for comprehensive medical and dental care and the developmentally disabled, may be given by the department of economic security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental

Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona (collectively referred to as Planned Parenthood) are private, non-profit, tax-exempt Arizona corporations that provide a full range of family planning services, including Title XX services provided under contract to the State of Arizona. Planned Parenthood of Central and Northern Arizona performs abortions and both organizations offer abortion referrals and abortion counseling. Thus, the Arizona Department of Economic Security, in order to comply with the statutory footnote, withheld state funding from Planned Parenthood.

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agencies or entities are exempt from the restrictions in this paragraph.

1980 Ariz. Sess. Laws 842, 860 n. *.

Despite the loss of state funding, Planned Parenthood continued to operate as a provider of state family planning services and to receive federal Title XX funds. Under an arrangement with the State of Arizona, private funds contributed by Planned Parenthood, instead of state funds, were used to meet the 10% matching-fund requirement. The fiscal 1980-1981 contract between Arizona and Planned Parenthood called for $47,000 in family planning services. Planned Parenthood brought suit in the district court to enjoin enforcement of the footnote to the appropriations bill.

On October 7, 1980, the District court preliminarily enjoined the defendants from complying with the challenged footnote, thus forcing the State to provide 10% of the total contract amount (i.e., $4,700) in state funds to Planned Parenthood. The

State of Arizona appealed the preliminary injunction, but the appeal was dismissed as moot after the district court declared the Arizona footnote unconstitutional and issued a permanent injunction on February 8, 1982. The district court's reasons for declaring the footnote unconstitutional were (1) that it infringed Planned Parenthood's freedom of speech and (2) that it was void for vagueness. On this appeal, the State of Arizona challenges the merits of the district court's decision declaring the footnote unconstitutional and enjoining its enforcement, the correctness of the issuance of the preliminary injunction, and the award of attorneys' fees.

## II. Free Speech Claim

In setting forth their positions, both Planned Parenthood and the State of Arizona invoke principles of law well

established in Supreme Court doctrine. The thrust of Planned Parenthood's argument is that the effect of the Arizona footnote is to penalize Planned Parenthood for exercising its constitutional right to freedom of speech;[2] "abortion referral" and "counseling for abortion procedures" are constitutionally protected speech, and the State of Arizona cannot declare such activities to be illegal. See Bigelow v. Virginia, 421 U.S. 809, 811, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) (statute making it a misdemeanor to sell or circulate any publication encouraging or promoting the procuring of an abortion declared an infringement of freedom of speech).

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2. The first amendment prohibition against infringement of freedom of speech is applicable to the states through the fourteenth amendment. Bigelow v. Virginia, 421 U.S. 809, 811, 95 S.Ct. 2222, 2227, 44 L.Ed.2d 600 (1975); Schneider v. State, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939).

Planned Parenthood argues, and the district court agreed, that the challenged Arizona statute is an unconstitutional attempt to do indirectly what the State could not do directly. In other words, Planned Parenthood maintains that instead of instituting a criminal penalty that restricts freedom of speech, the state is attempting to dissuade constitutionally protected speech activities by withdrawing a government benefit from those who engage in such activities.

The Supreme Court has clearly articulated that government may not restrict exercise of constitutionally protected rights, even when that restriction takes the form of withholding a benefit, rather than applying a penalty, for that exercise.

> For at least a quarter-century, this Court has made clear that even though a person has no

> "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526 [78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)]. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

For example, in Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), a Seventh Day Adventist challenged a South Carolina law denying unemployment benefits to persons who failed without good cause to accept

employment. The State declined to recognize as good cause her refusal to work on Saturday for religious reasons. The Supreme Court emphasized that the law placed her in a position of having to choose between denying the precepts of her religion and forfeiting benefits. Therefore, the Court found that the operation of the statute imposed a burden on the plaintiff's free exercise of her religion:

> In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry . . . . Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work,

> on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.
>
> . . . It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Id. at 403-04, 83 S.Ct. at 1793-9[illegible] (footnotes omitted).

Similarly, the Supreme Court struc[illegible] down a California statute that limited [illegible] tax exemption to those members of th[illegible] exempted class who affirmed their loyalt[illegible] to the state government. California wa[illegible] under no obligation to grant such an ex[illegible] emption; the benefit was gratuitous. Yet the Court found that the imposition o[illegible] such a condition upon even a gratuitou[illegible] benefit inevitably deterred or discourage[illegible] the exercise of the first amendment righ[illegible] of expression. Speiser v. Randall, 3[illegible]

U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). See also Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (denial of unemployment benefits to Jehovah's Witness who left job for religious reasons declared unconstitutional); Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (dismissal from nonpolicymaking position on basis of political affiliation declared unconstitutional); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (denial of welfare benefits to new residents unconstitutionally infringes right to travel).

We, of course, are bound by and endorse such precedent, but we do not agree that the principle articulated in Perry is dispositive of the present case. The Supreme Court has also unequivocally

stated that a state has no constitutional obligation to fund or promote abortion and "is not required to show a compelling interest for its policy choice to favor normal childbirth." Maher v. Roe, 432 U.S. 464, 477, 97 S.Ct. 2376, 2384, 53 L.Ed.2d 484 (1977). As the Court acknowledged in Maher, "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Id. at 475, 97 S.Ct. at 2383 (footnote omitted).

Planned Parenthood argues that the State has waived its option to refuse to fund abortion or abortion-related activities by affirmatively deciding to fund family planning programs. According to Planned Parenthood, once the State has made an affirmative decision to fund

family planning programs, the State cannot withhold funds from otherwise eligible providers solely because they promote and engage in constitutionally protected family planning methods the State disfavors. However, the Supreme Court's opinion in Maher expressly rejected similar logic.

In Maher, the Court rejected the holding of the district court panel that "abortion and childbirth . . . are simply two alternative medical methods of dealing with childbirth" and that if a state decides to fund one, it must also fund the other in order to avoid "weight[ing] the choice of the pregnant mother against choosing to exercise her constitutionally protected right" to have an abortion. Id. at 468, 97 S.Ct. at 2379. The Supreme Court held that a state could refuse to fund abortion while funding childbirth

because its refusal "place[d] no obstacles . . . in the pregnant woman's path to an abortion." Id. at 474, 97 S.Ct. at 2382. And, the Court said that the "State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there." Id. Similarly, Arizona's decision to refuse to fund abortion and abortion-related speech activities may make childbirth and advocation of childbirth more attractive alternatives, but it has imposed no restriction on access to abortions or on the free flow of information concerning abortion.

Supreme Court precedent in the area of private-school education is analogous. In Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the Court invalidated an Oregon criminal

law requiring the parent or guardian of a child to send him to public school, thus precluding the choice of a private school. The Court held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534-35, 45 S.Ct. at 573-74. Later in Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), the Court explicitly rejected the argument that Pierce established a "right of private or parochial schools to share with public schools in state largesse," for "[i]t is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid." Id. at 462, 93 S.Ct. at 2809.

We conclude that the State of Arizona may not unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech activities, but the State need not support, monetarily or otherwise, those activities.

A federal district court in Illinois, faced with a case similar to the present one, upheld as constitutional the portion of a state grant-in-aid program disqualifying applicants that provide abortion counseling and referral services. That court aptly described the situation:

> Planned Parenthood's application for funds under the Act indicates that it would have used the funds for a program which includes abortion-related services. Therefore, it is Planned Parenthood which seeks to interfere with the right of [the State] to decline to encourage abortions, rather than the converse. Planned Parenthood seeks to compel [the State] to adopt a position of neutrality; subsidizing childbirth and abortion-related counseling and referral services on an equal basis. However, as [Harris v.] McRae [488 U.S. 297, 100 S.Ct.

> 2671, 65 L.Ed.2d 784 (1980)] and Maher clearly indicate, there is no requirement that the state be neutral vis-a-vis abortion. It is free to express its preference for childbirth, by subsidizing it and not abortion.

Planned Parenthood Association--Chicago Area v. Kempiners, 531 F.Supp. 320, 325 (N.D.Ill. 1981), vacated and remanded on other grounds, 700 F.2d 1115 (7th Cir. 1983).

The question we must address in order to resolve this case is whether the Arizona statute embodies merely the State's refusal to fund activities it disfavors, or whether the State unduly interfered with Planned Parenthood's exercise of its right to perform abortion and abortion-related services. The State's constitutional purpose of promoting childbirth over abortion "may not be achieved by means which sweep unnecessarily broadly and thereby invade the

area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325 (1964), quoted in Griswold v. Connecticut, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965). We think it significant that the State allowed Planned Parenthood to continue as a Title XX provider of family planning services by contributing private funds in lieu of receiving state funds, thus making Planned Parenthood eligible for federal matching funds. The Arizona footnote withdrew only 10% of the governmental funding Planned Parenthood had been receiving for family planning services; the organization continued to receive the 90% of the funding that came from federal sources. Arizona could have placed a much more onerous burden on Planned Parenthood by refusing to operate as the channel through which the organization received

federal Title XX funds. The fact that the statute withdrew only state, and not federal, funds from Planned Parenthood indicates that the Arizona legislature's main concern was to ensure that state funds not be used in a manner contrary to state social welfare policy and not, as Planned Parenthood argues, to deter the organization from engaging in constitutionally protected activities.

However, it is not clear that the statute was drawn as narrowly as possible to permit the State to control use of its funds while infringing minimally on exercise of constitutional rights. The statute withheld all state funds from nongovernmental entities offering "abortions, abortion procedures, counseling for abortion procedures or abortion referrals." A more narrowly drawn statute, which would accomplish the stated

purpose of ensuring that state funds not be spent on activities the state legislature disfavors, would simply forbid entities receiving state funds from using those funds for abortions and the related activities listed above.

Arizona argues that such a narrowly drawn statute was infeasible for two reasons. The first is that the administrative difficulty of monitoring Planned Parenthood's use of the funds would make such monitoring impossible or highly impractical. The second reason is that even if the State could monitor Planned Parenthood's use of state funds in order to ensure that those funds did not support disfavored activities, state funding of any of Planned Parenthood's programs would "free up" funds to support abortion-related activities. We will deal with the second of these arguments first.

Other courts have looked upon the freeing-up theory with disfavor, see, e.g., Planned Parenthood of Minnesota v. Minnesota, 612 F.2d 359, 361 (8th Cir.), aff'd mem., 448 U.S. 901, 100 S.Ct. 3039, 65 L.Ed.2d 1131 (1980); Planned Parenthood Association--Chicago Area v. Kempiners, 568 F.Supp. 1490, 1495 (N.D.Ill. 1983), and we hold that as a matter of law, the freeing-up theory cannot justify withdrawing all state funds from otherwise eligible entities merely because they engage in abortion-related activities disfavored by the state. Applying the logic of the freeing-up argument to another setting shows its hazards. It can be argued that by providing welfare benefits to a pregnant indigent woman, a state would be freeing up whatever other funds she may have at her disposal for use in paying for an abortion. Thus, the free-

ing-up argument, when coupled with the holding of Maher v. Roe, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (states are not constitutionally required to fund therapeutic abortions as part of their Medicaid programs), would lead to the conclusion that a state could refuse all Medicaid benefits to an otherwise eligible applicant because she had exercised her right to have an abortion. Although the Supreme Court has never addressed such a situation, the Court did mention in a footnote to Harris v. McRae that a statute withdrawing all Medicaid benefits from an eligible recipient who had an abortion would pose "[a] substantial constitutional question" and implied that such a statute would impose an unconstitutional penalty on the Medicaid recipient. 448 U.S. 297,

317 n. 19, 100 S.Ct. 2671, 2688 n. 19, 65 L.Ed.2d 784 (1980).[3/]

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3. Even before the Harris opinion, the Supreme Court had noted the distinction between refusing to fund abortion and withdrawing all welfare benefits from an indigent woman who had obtained an abortion:

> Appellees rely on Shapiro v. Thompson, 394 U.S. 618 [89 S.Ct. 1322, 22 L.Ed.2d 600] (1969), and Memorial Hospital v. Maricopa County, 415 U.S. 250 [94 S.Ct. 1076, 39 L.Ed.2d 306] (1974). In those cases durational residence requirements for the receipt of public benefits were found to be unconstitutional because they "penalized" the exercise of the constitutional right to travel interstate.
>
> . . .
>
> If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in Shapiro, and strict scrutiny might be appropriate under either the penalty analysis or

The State's first argument against a more narrowly constructed statute--that monitoring Planned Parenthood's use of funds is administratively impossible--is a question of fact. Because the district court declared the statute at issue to be unconstitutional on a motion for summary judgment, the State has never had an opportunity to prove its contention. We, therefore, reverse the summary judgment and remand to give the State the opportunity to prove that withdrawing all state funds from Planned Parenthood was the only way to ensure that Planned Parenthood would not use state funds to support its abortion-related activities.

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the analysis we have applied in our previous abortion decisions.

Maher v. Roe, 432 U.S. 464, 474 n. 8, 97 S.Ct. 2376, 2383 n. 8, 53 L.Ed.2d 484 (1977).

III. Vagueness.

The district court found the statute to be void because the term "counseling for abortion procedures" is vague. The State of Arizona questions both the standing of Planned Parenthood to challenge the statute on the vagueness ground and the district court's finding of vagueness. While we hold that Planned Parenthood did have standing to challenge the statute as unconstitutionally vague, we further hold that the term "counseling for abortion procedures" is not so vague as to render the statute void.

The general rule with respect to standing to challenge a law as unconstitutionally vague is that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974);

see Broadrick v. Oklahoma, 413 U.S. 601, 608, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973); Dombrowski v. Pfister, 380 U.S. 479, 491-92, 85 S.Ct. 1116, 1123-24, 14 L.Ed. 2d 22 (1965). The State of Arizona argues that since the challenged statute withholds state funds from entities that perform abortions and since there is no contention that the terms "abortions" or "abortion procedures" are vague, Planned Parenthood has no standing to challenge the statute, for the statute clearly applies to Planned Parenthood's activities. The flaw in this argument is that only one branch of Planned Parenthood--Planned Parenthood of Central and Northern Arizona--performs abortions. Therefore, the State withheld funds from Planned Parenthood of Southern Arizona on the basis of its activities that were construed as "counseling for abortion pro-

cedures" or "abortion referral." Planned Parenthood challenged both of these terms as vague in the district court (although the court found only the former term to be vague). Therefore, Planned Parenthood had standing to challenge the statute on the ground that its terms are vague.

However, even if both Planned Parenthood entities performed abortions, we would have found standing to challenge the Arizona funding footnote. A different test of standing applies when the contention is that a statute places a prospective limitation on an individual's exercise of his first amendment expression right and the statute is so vague that a person of resonable intelligence cannot determine what the boundaries of that limitation are. The Supreme Court noted this distinction in Madison Joint School

District No. 8 v. Wisconsin Employment Relations Commission:

> The Wisconsin court's reliance on Broadrick v. Oklahoma, 413 U.S. 601 [93 S.Ct. 2908, 37 L.Ed.2d 830] (1973), for the proposition that one whose conduct falls squarely within an otherwise valid proscription may not challenge that proscription on grounds of vagueness, is inapposite. The challenged portion of the order is designed to govern speech and conduct in the future, not to punish past conduct, and as such it is the essence of prior restraint.

429 U.S. 167, 177, 97 S.Ct. 421, 427, 50 L.Ed.2d 376 (1976).

Even in its Broadrick decision, the Supreme Court acknowledged that the special protection afforded to first amendment rights includes use of a more liberal test of standing in overbreadth cases:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of

> expression has to give way to other compelling needs of society. As a corollary, the Court has altered its traditional rules of standing to permit--in the First Amendment area--"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

413 U.S. at 611-12, 93 S.Ct. at 2915-16 (citations omitted). As an otherwise eligible recipient of state funds, Planned Parenthood has standing to contend that the statute did not give adequate notice of what sorts of statements its members and staff must refrain from making in order for Planned Parenthood to remain eligible to receive state family planning services funds. See, e.g., Hynes v. Mayor

of Oradell, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976) (candidate for political office and campaign workers successfully challenged statute regulating campaign activities as not adequately specifying which campaign activities required advance notice to police department).

While we are satisfied that Planned Parenthood had standing to challenge the footnote on a vagueness claim, we find that the claim is without merit.

A statute is unconstitutionally vague if persons of "common intelligence must necessarily guess at its meaning and differ as to its application," Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), for in that situation, the statute "fails to give a person of ordinary intelligence fair notice" of conduct pro-

scribed or required by the statute, United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812 98 L.Ed. 989 (1954), and encourages arbitrary and erratic behavior on the part of those officials charged with enforcing the statute, see Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). The Supreme Court has set out the hazards of vague laws in even greater detail:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen,

> judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972) (footnotes omitted), quoted in Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982).

The level of scrutiny we must apply to a law challenged on the vagueness ground is not fixed. "The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depend in part on the nature of the enactment." Flipside, 455 U.S. at 498, 102 S.Ct. at 1193. A law that interferes with the right of free speech should receive relatively more stringent scrutiny. Id. at 499, 102 S.Ct.

at 1194; see Grayned, 408 U.S. at 109, 92 S.Ct. at 2299. On the other hand, we are more tolerant of possible vagueness in laws that impose civil rather than criminal penalties "because the consequences of imprecision are qualitatively less severe." Flipside, 455 U.S. at 499, 102 S.Ct. at 1194; see Winters v. New York, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948). Our tolerance should be even greater in a case, such as the one before us, where the consequence of noncompliance with the enactment is not a civil penalty, but merely reduction of a government subsidy.

In reviewing the challenged Arizona law, we are mindful that "due process does not demand unattainable feats of statutory clarity," United States v. Maude, 481 F.2d 1062, 1068 (D.C.Cir. 1973), and that "absolute precision in drafting laws is not

demanded," particularly where the law does not impose a criminal penalty. High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1229 (11th Cir. 1982). We note that in the present case Planned Parenthood represented to this court that it has kept separate accounts and ledgers for the abortion-related activities covered by the challenged footnote since the time that footnote went into effect. This demonstrates that Planned Parenthood was able to derive sufficient guidance from the statute to determine which activities were disfavored by the State of Arizona. Planned Parenthood argues that while it understands the statute's scope, it has been unable to receive an interpretation of the footnote from the Arizona officials administering the program, and so the organization fears that its interpretation will differ from that of the State. Sub-

stantial numbers of lawsuits arise out of disagreements over the precise meaning of a statute. The potential for such differences of opinion cannot be enough to render a statute void for vagueness.

Moreover, although the program administrators may have declined to give a legal opinion interpreting the challenged term, the state attorney general issued an opinion concerning a predecessor to the footnote actually enacted in which he expounded upon the limits of the phrase "counseling for abortion procedures." Cf. Smith v. Goguen, 415 U.S. 566, 580 n. 29 (majority opinion) & 597 (Rehnquist, J., dissenting), 94 S.Ct. 1242, 1251 n. 29 & 1259, 39 L.Ed.2d 605 (1974) (looking to opinions of state attorney general for guidance in determining vagueness of statute). According to the attorney general's opinion, the term "counseling

for abortion procedures" applies to "counseling insofar as such counseling explains abortion procedures. That is not to say that a doctor . . . may not use the word 'abortion' in his consultation with his patient. The footnote should not be construed to interfere with the doctor-patient privilege and the doctor's obligation to his patient." Ariz.Att'y Gen.Op. No. I79-252 at 3 n. 5 (Oct. 11, 1979). This definition serves to answer the rhetorical questions the district court put forth in explaining its rationale for declaring the law void for vagueness. 537 F.Supp. at 92.

Throughout its brief to this court, Planned Parenthood used the terms "counseling for abortion procedures" and "abortion counseling" interchangeably. Had the state legislature used the latter term, Planned Parenthood's vagueness claim

would have been stronger. We find that "counseling for abortion procedures" is a more narrowly drawn term. The term "abortion procedure" is commonly used to refer to the actual operation performed by medical personnel in carrying out the abortion. See, e.g., Roe v. Arizona Board of Regents, 113 Ariz. 178, 180, 549 P.2d 150, 152 (1976). Thus, the reasonable person would understand the statute to refuse funding for counseling activities closely tied to the actual abortion operation, such as preparing a woman who has already decided to have an abortion for the medical treatment she is about to undergo.

We reverse the district court's finding that the term "counseling for abortion procedures" is impermissibly vague.

IV. Preliminary Injunction

Although the district court, on February 8, 1982, decided this case on the merits and instituted a permanent injunction against enforcement of the Arizona statute, the State of Arizona seeks to appeal the preliminary injunction granted by the district court on October 6, 1980. The State invokes the eleventh amendment in arguing that the district court erroneously granted the preliminary injunction. We have twice declined to hear the appeal on the ground that imposition of the permanent injunction made the question moot.

On January 4, 1982, we dismissed the first appeal on the basis of Planned Parenthood's representation that a permanent injunction had been granted. In fact, the district court announced orally that it would issue a permanent injunction on April 6, 1981, but did not enter a

written order until February 8, 1982. Arizona thus claims that it was deprived of its rightful appeal on January 4, 1982, because of Planned Parenthood's misrepresentation. On March 25, 1982, we rejected Arizona's second attempt to appeal the imposition of the preliminary injunction, determining that the question of whether or not there actually had been a permanent injunction in effect on January 4, 1982, was mooted by the uncontested fact that a permanent injunction was in effect as of February 8, 1982.

In asking for reconsideration of our March 25, 1982, ruling, Arizona is asking us to ignore the "law-of-the-case" doctrine, which states that the decision of a legal issue by an appellate court must be followed in all subsequent proceedings in the same case at either the trial or appellate level. Moore v. Jas. H.

Matthews & Co., 682 F.2d 830, 833 (9th Cir. 1982). The discretion of an appellate court to review its earlier decisions should be exercised sparingly in order to avoid undermining the policy of finality that underlies the rule. Id. at 834; see Lathan v. Brinegar, 506 F.2d 677, 691 (9th Cir. 1974) (en blanc). Thus, the law-of-the-case doctrine applies "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967), quoted in Moore, 682 F.2d at 834.

Arizona argues that we should hear its current appeal of the preliminary injunction notwithstanding the imposition of the permanent injunction and our previous

decision that the appeal was moot, because the constitutional question raised is one that is "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). In other words, Arizona argues that it and other states will in the future be subject to such questionable preliminary injunctions, but may never be able to receive a hearing from an appellate court because imposition of a permanent injunction will always moot the appeal.

In the absence of a class-action suit, the "capable of repetition, yet evading review" doctrine is limited to situations where two elements combine: (1) the challenged action was of limited duration, too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same

complaining party will be subjected to the same action again. Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975) (per curiam). The doctrine has been invoked in cases where a court order, by its own terms, expired in a few days or in cases where the question raised was mooted by the termination of a nonjudicial activity that is usually of short duration. See, e.g., Nebraska Press Assn. v. Stuart, 427 U.S. 539, 546-47, 96 S.Ct. 2791, 2796-97, 49 L.Ed.2d 683 (1976) (pre-trial publicity order expired once jury impaneled); Carroll v. President of Princess Anne, 393 U.S. 175, 178-79, 89 S.Ct. 347, 350-51, 21 L.Ed.2d 325 (1968) (10-day order); Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 (1973) (human gestation period too short to allow completion of appellate procedure); Trans International Airlines, Inc.

v. International Brotherhood of Teamsters, 650 F.2d 949, 956 n. 5 (9th Cir. 1980) (great majority of economic strikes do not last long enough for complete judicial review).

A preliminary injunction is not a court order that expires after the passage of a prescribed or fixed amount of time; it remains in effect until the district court can hold a full hearing on and decide the merit of the case. A preliminary injunction may well be in effect long enough to allow appellate review. Indeed, we hear many appeals of preliminary injunctions. See, e.g., Painting and Decorating Contractors Association v. Painters and Decorators Joint Committee, 707 F.2d 1067 (9th Cir. 1983); Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197 (9th Cir. 1980); Munoz v. County of Imperial, 604

F.2d 1174 (9th Cir. 1979), vacated, 449 U.S. 54, 101 S.Ct. 289, 66 L.Ed.2d 258 (1980). It is true that Arizona or some other state may be subjected to a similar preliminary injunction in the future. However, it is quite possible that another preliminary injunction against a state may be in effect long enough to allow appellate review of the issues Arizona now seeks to raise. Therefore, this situation does not meet the criteria for invoking the "capable of repetition, yet evading review" exception to the doctrine of mootness. Moreover, because of the complexity and importance of the eleventh amendment question the state of Arizona seeks to bring before us, we believe it would be preferable to address such issues in a context that presents live, rather than hypothetical, issues.

None of the exceptions to the law-of-the-case doctrine apply in the present situation. We are bound by our ruling on March 25, 1982, that the questions raised by the imposition of a preliminary injunction against the State of Arizona were mooted by the imposition of the permanent injunction, and we dismiss Arizona's appeal of the preliminary injunction.

V. Attorneys' Fees

Because we are remanding this case, we vacate the attorneys' fee award pending the outcome on reconsideration. However, we note that we find nothing improper in the manner in which the district court computed the attorneys' fee.

The district court computed the amount of the award by first determining the number of allowable hours Planned Parenthood's attorneys spent on the case and

multiplying this number by their customary hourly rate. The resulting product, $36,278, was labeled the "lodestar" amount. The district court then considered the controversy surrounding the issues involved in the litigation, the importance of those issues, the contingent nature of the fee arrangement between the plaintiffs and their attorneys, the novelty and complexity of the issues involved, the time pressure placed on the plaintiffs' attorneys, and the reputation, experience, and ability of the plaintiffs' attorneys. On the basis of these factors, the district court decided to increase the lodestar amount by a multiplier of 10%.

Arizona argues that 42 U.S.C. § 1988 provides for an award of "reasonable attorneys' fees," and that a reasonable attorneys' fee would be an amount equal to the number of attorney hours expended

multiplied by the customary hourly rate charged by the attorneys (i.e., the district court's lodestar amount). According to Arizona, any sum awarded beyond the lodestar amount is more closely akin to punitive damages than to reasonable attorneys' fees. However, Arizona's definition of a reasonable attorneys' fee award contradicts clear precedent in this court. In Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976), we established 12 factors that a district court should consider in determining a reasonable attorneys' fee award. Among those considerations were (1) the time and labor required; and (2) the customary fee. If the State of Arizona were correct in its assertion, only these two factors would be relevant considerations. Yet Kerr set

forth 10 additional factors. Id. The list of factors adopted in Kerr closely parallels the factors considered by the district court in the present case.

In addition to setting forth a list of factors, we explicitly stated in Kerr that failure to consider such factors when determining the amount of an attorneys' fee award is an abuse of discretion. Id. Thus, the district court's adjustment of the attorneys' fee award to reflect factors other than the number of hours of attorney time expended and the normal hourly rate was not only allowed, but required, by the Kerr decision. The district court considered the necessary factors and there is nothing to suggest that the court abused its discretion in any way in determining the appropriate "multiplier" or adjustment factor. Cf. Hensley v. Eckerhart, ___ U.S. ___, 103

S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983) ("exceptional success" may justify enhanced attorneys' fee award).

REVERSED AND REMANDED.

## APPENDIX D

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED FEBRUARY 8, 1982

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona non-profit corporation; Planned Parenthood of Southern Arizona; Jack Bashaw, M.D., on behalf of himself, his patients, and all others similarly situated, Plaintiffs,

v.

The STATE OF ARIZONA; Bruce E. Babbitt, individually and as Governor of the State of Arizona; William Jamieson, individually and as Director of the Department of Economic Security; Robert K. Corbin, individually and as Attorney General of the State of Arizona, Defendants.

No. CIV 80-665 PHX WEC

United States District Court,

D. Arizona.

Feb. 8, 1982.

ORDER

Plaintiffs are private non-profit Arizona corporations which provide a full range of family planning services, counseling for abortion procedures, and the dissemination of general abortion information. Prior to the passage of a General Fund Appropriations Bill by the Arizona State Legislature, plaintiffs had been funded in part with Federal funds, and in part with State "in kind" matching funds, under Title XX of the Social Security Act, 42 U.S.C. § 1397.

A footnote to the abovementioned Appropriations Bill prohibited state money from being given to agencies or entities which offer abortions, abortion procedures, "counseling for abortion procedures" or "abortion referrals". But for the footnote in question the plaintiffs

would be fully qualified to receive a portion of the state funds.

The right to advertise and disseminate abortion information was clearly recognized in Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d 600 (1975). Furthermore, counseling patients in regards to abortion procedures or abortion referrals is protected by the First Amendment. Young Women's Christian Ass'n of Princeton, N.J. v. Kugler, 342 F.Supp. 1048 (D.N.J. 1972).

It is a well settled principle of constitutional law that governmental regulations limiting free speech rights, which seek to stifle a communication because of its content are fundamentally at odds with the First Amendment. Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Because the primary purpose of the footnote is to limit the consti-

tutionally protected communication of abortion information, the footnote must be declared unconstitutional.

In order for the plaintiffs to continue to be eligible recipients of the state funds they must comply with the dictates of the footnote. Such compliance necessarily means that the plaintiffs would be prohibited from exercising their First Amendment right to disseminate abortion information.

It is clear from the abovementioned cases that the First Amendment prohibits the state from directly restricting the plaintiffs from engaging in "abortion counseling" or "abortion referral". By way of the footnote to the Appropriations Bill however, the State in attempting to restrict the plaintiff's freedom of speech tries to accomplish indirectly what it cannot do directly. This attempt to usher

through the "back door" a result which the state could not accomplish directly was rejected by the Supreme Court in Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). There, the Court held:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on the basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which it could not command directly.' Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible."

Furthermore, the footnotes' prohibition against "counseling for abortion procedures" is sufficiently vague to render the legislation in question void. Does "counseling" refer to the act of advocating abortion as an alternative to pregnancy and childbirth, or does it merely refer to voluntarily offering advice on abortion? If a pregnant woman seeks advice on the alternatives to pregnancy, must the plaintiffs refrain from even mentioning abortion as an alternative? Must the plaintiffs refrain from mentioning the abortion alternative even where an abortion may be medically necessary to save the life or preserve the health of the patient?

The due process clause of the Fourteenth Amendment prohibits deprivation of liberty or property without due process of law. It is well established that a

"statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed.2d 888 (1939); Connally v. General Construction Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

A vague statute is especially vulnerable to constitutional attack when it impinges upon the exercise of protected constitutional rights, such as freedom of speech. Keyishian v. Board of Regents, 385 U.S. 589, 604, 87 S.Ct. 675, 684, 17 L.Ed.2d 629 (1967).

In the final analysis, due to the footnote's ambiguity the plaintiffs will be forced to guess whether they are in

violation of the law when they engage in an abortion related conversation with one of their clients. The danger of liability for incorrectly interpreting the footnote will undoubtedly have a chilling effect on the exercise of the plaintiff's constitutional right of freedom of speech. This the Constitution will not permit.

It is well established that a challenged statute which impinges upon a fundamental constitutional right, such as freedom of speech, will be subject to strict scrutiny by the courts and will be stricken if the infringement does not serve a compelling state interest. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Arizona has not shown any compelling state interest which justifies the necessity of the footnote and which overrides the private rights of the individual plaintiffs.

For the reasons mentioned above, this Court declares the footnote in question to be unconstitutional and therefore the State is permanently enjoined from enforcing said footnote.

FOOTNOTE

1. On this point we stated: "[W]e vacate the attorneys' fee award pending the outcome on reconsideration. However, we note that we find nothing improper in the manner in which the district court computed the attorneys' fee." In this circuit, dicta are "not part of the law of the case." Russell v. Commissioner, 678 F.2d 782, 785 (9th Cir. 1982). We are, therefore, free to disregard our earlier statements on this point.

Supreme Court, U.S.
FILED
OCT 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-378

UNITED STATES SUPREME COURT

October Term, 1986

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PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D., Cross-Appellants,

v.

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security; and ROBERT K. CORBIN, Attorney General of the State of Arizona, Cross-Appellees,

---

On appeal from the
United States Court of Appeals
for the Ninth Circuit

# MOTION TO DISMISS OR AFFIRM

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Cross-appellees move to dismiss the cross-appellant (Planned Parenthood)'s appeal from the October 18, 1983 decision of the Court of Appeals for the Ninth Circuit for the reasons that (1) Planned Parenthood never raised in the court below the unconstitutionality of the first paragraph of the Arizona footnote; and (2) the Court of Appeals decision appealed from is plainly correct.

## STATEMENT OF THE CASE

In fiscal year 1980-81, Arizona placed a footnote on state appropriations in its Department of Economic Security legislation. The footnote provides:

> No state money may be spent by the department of economic security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of a pregnant woman.
>
> No state money, other than money for comprehnsive medical and dental

> care and the developmentally disabled, may be given by the department of economic security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental agencies or entities are exempt from the restrictions in this paragraph.

The first paragraph of the footnote proscribes the use of state money for abortions and certain abortion-related activities. The second paragraph prohibited funding by the state to any entity which provides abortions and certain abortion-related activities. The district court found that the footnote was void for vagueness and struck down the footnote also on First Amendment grounds. In its first opinion, Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983) (Planned Parenthood I), the Court of Appeals for the Ninth Circuit upheld the first paragraph of the footnote, reversed the void-for-vagueness decision, and remanded the case to the dis-

trict court to ascertain certain facts which it believed would be determinative of the constitutionality of the second paragraph of the footnote. Upon remand, the district court, in an unpublished order, granted Planned Parenthood's motion for summary judgment. The Court of Appeals affirmed that decision, Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir. 1986) (Planned Parenthood II). The state defendants have appealed that decision to this Court, Bruce Babbitt, et al. v. Planned Parenthood, No. 86-369. Planned Parenthood has conditionally cross-appealed not from Planned Parenthood II, but from Planned Parenthood I, a decision from which they could have, but did not, seek certiorari in this Court.

## ARGUMENT

The cross-appellants (Planned Parenthood) never argued in the Court of Appeals

that the state proscription as to the use of state funds for abortion and abortion-related activities was unconstitutional. In fact, Planned Parenthood expressly conceded in their brief below that it "does not seek, as the State implies, to force the State to fund activities which it has chosen not to fund . . . ."[1/] And it reiterated that "Planned Parenthood does not seek to compel funding of activities which the State has chosen not to fund."[2/] Moreover, in its motion for rehearing in the court below, Planned Parenthood did not argue that the Court of Appeals' decision as to the constitutionality of the State's proscription of the use of state funds was erroneous. That issue was raised for the first time only by the

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1. Appellees' brief at p. 12--See Appendix.

2. Appellees' brief at p. 16--See Appendix.

American Civil Liberities Union (ACLU) in its brief amicus curiae urging rehearing.[3/] Upon denial of its motion for rehearing and suggestion for rehearing en banc, Planned Parenthood did not seek review by certiorari in this Court.

Cross-appellees submit that a party which had expressly agreed, waived or conceded an issue in the court below cannot change its course and urge this Court to reverse or overrule a decision based on its agreement, waiver or concession. Public Service Commission v. Havemeyer, 296 U.S. 506 (1936); Mercelis v. Wilson, 235 U.S. 579 (1915); Cavender v. Cavender, 114 U.S. 464 (1885).

Additionally, it is the general rule that a federal appellate court does not consider an issue not presented for review

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3. The Court of Appeals, by order dated March 27, 1984, denied as moot ACLU's motion to appear as amicus curiae.

below. Youakin v. Miller, 425 U.S. 231 (1976); Hormel v. Helvering, 312 U.S. 552 (1941). Cross-appellants cannot, in this cross-appeal, raise the issue that the first paragraph of the Arizona footnote is unconstitutional.

Cross-appellants also argue that the Court of Appeals' decision in Planned Parenthood I that the footnote was not void for vagueness is erroneous. That argument has no merit. As the Court of Appeals recognized, although Planned Parenthood, in its arguments below, employed the terms "abortion counseling" and "counseling for abortion procedures" interchangeably, the Arizona Legislature used only the latter language. Moreover, the latter term has been authoritatively interpreted by the Arizona Attorney General to apply to "counseling insofar as such counseling explains abortion procedures. That is not to say that a doctor . . . may not use the word

'abortion' in his consultation with his patient. The footnote should not be construed to intervene with the doctor-patient privilege and the doctor's obligation to his patient (Ariz.Atty Gen.Op. No. I79-252 at 3, n. 5, Oct. 11, 1979)." Planned Parenthood I, 718 F.2d 938, 949.[4/]

The term "counseling for abortion procedures" is not vague as interpreted by the Arizona Attorney General's opinion which predated the adoption of the footnote in question. Planned Parenthood's attempt to continue their mischaracterization of this language and its meaning should not be permitted.

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4. In Arizona, Attorney General opinions are provided for by statute. Arizona Revised Statutes § 41-193.A.7 provides that the department of law shall "upon demand by the legislature or either house thereof, any public officer or a county attorney, render a written opinion upon any question relating to their offices. Such opinions shall be public records."

## CONCLUSION

Planned Parenthood's conditional cross-appeal is frivolous and the motion to dismiss or affirm should be granted.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

ANTHONY B. CHING
Solicitor General

# A P P E N D I X

Excerpts from Planned Parenthood's Brief
in the United States Court of Appeals
for the Ninth Circuit, No. 82-5437
(718 F.2d 938 (9th Cir. 1983))

Pages 12-13 of brief: Appendix page 1

Page 16 of brief: Appendix page 3

## ARGUMENT

### I. THE DENIAL OF STATE FUNDS TO PLANNED PARENTHOOD CONSTITUTES A PENALTY FOR EXERCISING CONSTITUTIONAL RIGHTS[3]

The State's argument that its denial to Planned Parenthood of State funds (to which Planned Parenthood would otherwise be entitled) is not a penalty imposed upon the exercise of its constitutional rights, is without merit. Planned Parenthood does not

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3 With respect to this Court's review of the trial court's granting of Planned Parenthood's Motion for Summary Judgment, the reviewing court is to apply the same test applied by the trial court. That is, affirmance is appropriate if there exists no genuine issue of material fact, and the moving party is entitled to prevail as a matter of law. See, Rule 56(c), F.R.C.P.; Radobenko v. Automated Equipment Corporation, 520 F.2d 540, 543 (9th Cir. 1975).

seek, as the State implies, to force the State to fund activities which it has chosen not to fund. Rather, the State of Arizona has mde an affirmative decision tc fund family planned programs. The record before the trial court established that the State made available, for purposes of State matching funds under Title XX family planning programs, $54,278.00, for the period of October 1, 1980 until June 30, 1981. (Planned Parenthood's Memorandum in Support of Motion for Summary Judgment, CR 59, at p. 5.) It is undisputed by the State that, in the absence of the footnote, Planned Parenthood would be entitled to receive State and Federal funds under the Title XX program. [Emphasis in original.]

The State's reliance on Maher v. Roe, 432 U.S. 464 (1977) is misplaced. Planned Parenthood does not seek to compel funding of activities which the State has chosen not to fund. Again, the undisputed facts are that the State has already determined to make money available for family planning services under Title XX, and that Planned Parenthood is a qualified recipient of those funds. These funds were sought to be denied to Planned Parenthood solely on the basis that it engages in the constitutionally protected activities of providing abortions and/or abortion counseling and referrals [footnote omitted; emphasis in original.]

Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 86-378

UNITED STATES SUPREME COURT

October Term, 1986

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PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D., Cross-Appellants,

v.

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On Appeal from the United States Court of Appeals for the Ninth Circuit

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# RESPONSE TO MOTION TO DISMISS OR AFFIRM

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NO. 86-378

UNITED STATES SUPREME COURT

October Term, 1986

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PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D., Cross-Appellants,

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On Appeal from the United States Court of Appeals for the Ninth Circuit

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| Moore v. New York Cotton Exchange, 270 U.S. 593 (1925) . . . . . | 5 |
| Perkins v. Elg, 307 U.S. 325 (1939) . . . . . | 9 |
| Planned Parenthood v. Arizona, 537 F.Supp. 90 (D. Ariz. 1982) . . . . . | 1 |
| Planned Parenthood v. Arizona, 718 F.2d 939 (9th Cir. 1983) . . . . . | 2,3, 4,5, 6,7 |
| Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir. 1986) . . . . . | 6,7 |

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State v. Deddens, 112 Ariz. 425, 542 P.2d 1124 (1975) . . . 8

State v. Toulouse, 122 Ariz. 275 594 P.2d 529 (1975) . . . . . 8

OTHER AUTHORITIES

Arizona Op. Att'y General No. I 78-283 (R 78-310), p. 2, December 21, 1978 . . . . 8

## ARGUMENT

### I. PLANNED PARENTHOOD'S RIGHT TO RAISE CERTAIN ISSUES ON ITS CROSS-APPEAL IS INTACT.

Contrary to the State's assertion, Planned Parenthood clearly assailed the footnote at issue -- in all of its aspects -- below. In the district court, Planned Parenthood contended that both paragraphs of the footnote were unconstitutional, for a multitude of reasons.* The district court found that on at least two grounds -- free speech and vagueness -- both paragraphs of the footnote were unconstitutional. Planned Parenthood v. Arizona, 537 F.Supp. 90 (D. Ariz. 1982)

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* In addition to the free speech and vagueness claims, Planned Parenthood asserted that the entire footnote was unconstitutional on these additional grounds: violation of the Supremacy Clause; violation of privacy rights; violation of Equal Protection Clause; violation of Privileges and Immunities Clause.

(see Appendix D to Planned Parenthood's Jurisdictional Statement).

On the State's appeal from this determination, and consistent with our position in the district court, Planned Parenthood argued that the district court had correctly found both paragraphs of the footnote to be unconstitutional. The issue of whether it was proper for the Ninth Circuit in Planned Parenthood I (Planned Parenthood v. Arizona, 718 F.2d 939 (9th Cir. 1983)) to have reversed the district court's determination regarding the first paragraph of the footnote was never conceded by Planned Parenthood. The State's contention to the contrary is demonstrably incorrect.

First. Planned Parenthood has never taken the position that the State may use its fiscal muscle in derogation of Planned Parenthood's constitutional

rights. At page 4 of its Motion to Dismiss or Affirm, the State badly mischaracterizes Planned Parenthood's argument to the Court of Appeals in Planned Parenthood I. Consistent with this Court's decisions in cases such as Maher v. Roe, 432 U.S. 464 (1977), Planned Parenthood recognized that the State could not be required to fund family planning services. But Planned Parenthood also contended -- consistent with Maher -- that once a state decides to fund family planning services, it must do so subject to constitutional limitations, and that a law which made funding dependent on the content of speech was patently unconstitutional. See Planned Parenthood's brief to Ninth Circuit in Planned Parenthood I, at p. 25 (Appendix A hereto).

The State's limited, out-of-context excerpting of Planned Parenthood's

Ninth Circuit brief neglects to reflect this important aspect of Planned Parenthood's argument.

Second. The State argues that Planned Parenthood somehow "waived" its right to challenge Planned Parenthood I by failing to file a petition for certiorari from that determination. In fact, it is clear that it would have been procedurally inappropriate for Planned Parenthood to have filed such a petition at that time. The Court of Appeals in Planned Parenthood I reversed and remanded the case, instructing the district court to resolve an issue of fact. The remand thus required the district court's further substantive participation in the case; that is, the remand was not one requiring the performance of a mere ministerial act by the district court. Under these circumstances, it is clear that Planned Parenthood could not then have petitioned for

certiorari. See for example, Earle v. Myers, 207 U.S. 244 (1907), where this Court held that where a court of appeals reverses a district court determination and remands the case for further substantive proceedings in conformity with the appellate court's opinion, that opinion is not final -- and thus not subject to Supreme Court review.*

Third. The State also contends that Planned Parenthood's decision not to seek reconsideration of Planned Parenthood I bars consideration of the speech issue (as it relates to the first paragraph of the footnote) by this Court. Not

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* Compare, Chicago v. Atchison, Topeka & Santa Fe R. Co., 357 U.S. 77 (1958); and Moore v. New York Cotton Exchange, 270 U.S. 593 (1925). In both of these cases, this Court held that where the duties imposed on the trial court by the court of appeals are merely ministerial, the order is considered final for purposes of appeal to the Supreme Court.

only does the State fail to provide any case support for this proposition, but the argument, as well, is squarely at odds with the State's position that it may raise the Hatch Act argument in its appeal. While, as the State concedes in its Jurisdictional Statement, at p. 12, n. 2, the court of appeals rejected its Hatch Act argument, the State never -- neither after the court of appeals' ruling in Planned Parenthood I, nor after its ruling in Planned Parenthood II (Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir. 1986)) -- sought reconsideration of this determination. Indeed, the State did not seek reconsideration of any aspect of the Planned Parenthood II decision, although that decision is the court of appeals decision which the State has now asked this Court to review. See, State's Jurisdictional Statement, at p. 2 ("This appeal

is taken from a judgment dated May 15, 1986, of the Court of Appeals for the Ninth Circuit . . .").*

In sum, Planned Parenthood has not "expressly waived or conceded" the issues raised in its conditional cross-appeal. The cases cited by the State at page 5 of its Motion are therefore inapposite. In addition, Planned Parenthood expressly contended -- in both the district court and the court of appeals -- that both paragraphs of the footnote were unconstitutional. The State's argument to the contrary is meritless, and the cases it cites at page 6 of its Motion are also inapposite.

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* The State contends (at p. 3 of its Motion) that Planned Parenthood is appealing the decision in Planned Parenthood I, not Planned Parenthood II. In making this argument, the State overlooks the fact that its appeal is, at its essence, founded upon the issues it raised in Planned Parenthood I.

## II. THE INTERPRETATION GIVEN TO THE LEGISLATION BY THE ARIZONA ATTORNEY GENERAL DOES NOT CURE THE STATUTE'S VAGUENESS.

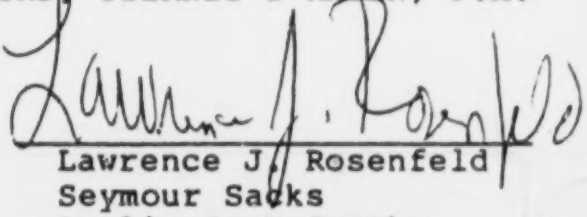
Finally, the State's contention that an opinion issued by the Arizona Attorney General "resolves" the vagueness issue (See Section III of Planned Parenthood's Jurisdictional Statement) does not withstand scrutiny. Arizona Attorney General opinions do not have the force of law, are advisory only, and are not binding on the courts. See, Marston's, Inc. v. Roman Catholic Church, 132 Ariz. 90, 644 P.2d 244 (1982); State v. Toulouse, 122 Ariz. 275, 594 P.2d 529 (1979); State v. Deddens, 112 Ariz. 425, 542 P.2d 1124 (1975). See also, Arizona Op. Att'y General No. I 78-283 (R 78-310), p. 2, December 21, 1978 (opinions of the Attorney General are advisory only, are not binding on courts of law, and are not a legal determination of what the law

is at any certain time). Likewise, the Supreme Court has ruled that it is not bound by the United States Attorney General's opinions regarding the interpretation of statutes or treaties; see, Perkins v. Elg, 307 U.S. 325, 349 (1939).

III. CONCLUSION

For all of the foregoing reasons, Planned Parenthood respectfully requests that the State's Motion to Dismiss or Affirm be denied.

SACKS, TIERNEY & KASEN, P.A.

By 

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NO. 86-378

UNITED STATES SUPREME COURT

October Term, 1986

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PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D., Cross-Appellants,

v.

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security; and ROBERT K. CORBIN, Attorney General of the State of Arizona, Cross-Appellees.

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On Appeal from the United States Court of Appeals for the Ninth Circuit

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# APPENDIX TO RESPONSE TO MOTION TO DISMISS OR AFFIRM

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## Appendix A

Brief of Planned Parenthood to United States Court of Appeals for the Ninth Circuit, No. 82-5437 (718 F.2d 938 (9th Cir. 1983)), at p. 25

## APPENDIX A

Thus, the fact of lack of even-handed application significantly distinguishes this case from Letter Carriers, Broadrick, and Buckley v. Valeo, 424 U.S. 1 (1976). For, in contrast to our situation, none of those cases involved the imposition of a prohibition or restriction based upon one's particular point of view. None of those cases restricted the constitutional rights only of those federal employees who espoused a particular political point of view, or provided campaign funding only to those political parties taking a favorable stance on a particular issue. The prohibitions and restrictions were applied completely independently of any such consideration -- as the courts in each of those cases indicated must necessarily be the case in

order for the law to survive constitutional scrutiny. Those cases thus stand not as support for the State's position, but in stark contrast thereto.